

November 29, 2007

**AO DRAFT COMMENT PROCEDURES**

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

Two alternative DRAFTS of ADVISORY OPINION 2007-25 are available for public comments under this procedure. It was requested by Christopher DeLacy, Esq., on behalf of Holland & Knight, LLP.

Two alternative drafts of Advisory Opinion 2007-25 are scheduled to be on the Commission's agenda for its public meeting of Thursday, December 6, 2007.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00pm noon (Eastern Time) on December 5, 2007.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

### **CONTACTS**

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2007-25, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at [www.fec.gov](http://www.fec.gov).

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

### **MAILING ADDRESSES**

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FEDERAL ELECTION COMMISSION  
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November 29, 2007

MEMORANDUM

**AGENDA ITEM**  
For Meeting of: 12-06-07

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*  
General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Ron Katwan *R.BK*  
Assistant General Counsel

Albert J. Kiss *AJK*  
Attorney

Subject: Draft AO 2007-25

Attached are two alternative proposed drafts of the subject advisory opinion. We request that these drafts be placed on the agenda for December 6, 2007.

Attachment

1 ADVISORY OPINION 2007-25

2  
3 Christopher DeLacy, Esq.  
4 Holland & Knight LLP  
5 2099 Pennsylvania Ave., N.W., Suite 100  
6 Washington, D.C. 20006-6081  
7

**DRAFT A**

8 Dear Mr. DeLacy:

9 We are responding to your advisory opinion request on behalf of Holland &  
10 Knight (the "Firm"), concerning the application of the Federal Election Campaign Act of  
11 1971, as amended (the "Act"), and Commission regulations to the Firm's status as a  
12 corporation or a partnership under the Act and Commission regulations. The Firm asks if  
13 it may administer and "financially support" the Holland & Knight Committee for  
14 Effective Government ("the Committee") as its separate segregated fund ("SSF").

15 The Commission concludes that the Firm is a partnership under the Act and  
16 Commission regulations, and not a corporation. Hence, all administrative and financial  
17 support provided to the Committee by the Firm would constitute contributions subject to  
18 the Act's amount limitations.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on  
21 October 11, 2007, and your email received on October 19, 2007.

22 The Firm is a law firm that is a limited liability partnership ("LLP") organized  
23 under the laws of Florida. On October 1, 2007, the Firm elected to classify itself as an  
24 association taxable as a corporation for federal tax purposes pursuant to 26 CFR  
25 301.7701-3. The Firm will continue to be treated as an LLP under Florida law and the  
26 law of all other states in which it operates. The Firm will be taxed as a partnership in

Massachusetts and Florida, although it will be taxed as a corporation in other States in which it operates.

The Committee filed a statement of organization on December 12, 2006 and is a nonconnected multicandidate committee.

***Questions Presented***

*(1) Is the Firm a corporation or a partnership under the Act and Commission regulations?*

*(2) May the Firm administer and financially support the Committee as its SSF?*

*(3) If the answer to Question 2 is no, may the Firm continue to contribute to the Committee as a nonconnected political committee?*

***Legal Analysis and Conclusions***

*(1) Is the Firm a corporation or a partnership under the Act and Commission regulations?*

The Firm is a partnership under the Act and Commission regulations because it is an LLP under Florida law.

As described in more detail below, whether the Firm is a corporation for purposes of the Act determines whether it may pay administrative expenses of the Committee without those amounts being a “contribution or expenditure” as defined in the Act and Commission regulations.<sup>1</sup>

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<sup>1</sup> The definition of “contribution or expenditure” includes a “gift of money . . . or anything of value” in connection with a Federal election. 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a); *see also* 2 U.S.C. 431(8) and (9); 11 CFR 100.52 and 100.111.

1           Neither the Act, Commission regulations nor the Act's legislative history define  
2   "corporation" or "partnership." Instead, the Act's legislative history and Commission  
3   regulations rely on State law to distinguish a partnership from a corporation. For  
4   example, in considering how the predecessor of 2 U.S.C. 441b's prohibition on corporate  
5   contributions applied to a "professional corporation composed of doctors, lawyers,  
6   architects, engineers, etc.," the Committee on House Administration stated that  
7   "[w]hether or not a professional association is a corporation is a matter determined under  
8   State law." *See* H.R. Rep. 93-1239, 93d Cong., 2d Sess., at 21 (1974), *reprinted in*  
9   *Legislative History of the Federal Election Campaign Act Amendments of 1974* ("1974  
10   *Act Legislative History*"), at 655 (1977); *accord* H.R. Rep. No. 93-1438, 93d Cong., 2d  
11   Sess., at 68 (1974) (Conf. Rep.), *reprinted in 1974 Act Legislative History*, at 1012  
12   (1977).<sup>2</sup>

13           The Commission created a limited exception to the application of State law when  
14   it promulgated regulations with respect to a different business form, limited liability  
15   companies ("LLCs"). While Commission regulations define an LLC as "a business  
16   entity that is recognized as a limited liability company under the laws of the State in  
17   which it is established," the regulations treat as corporations LLCs that elect to be treated  
18   as corporations by the Internal Revenue Service under 26 CFR 301.7701-3. 11 CFR  
19   110.1(g)(1) to (3). However, in promulgating its LLC rules, the Commission emphasized  
20   that:

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<sup>2</sup> Commission regulations addressing membership organizations, cooperatives and corporations without capital stock similarly state that "[t]he question of whether a professional organization is a corporation is determined by the law of the State in which the professional organization exists" [emphasis added]. 11 CFR 114.7(d).

[Section 110.1(g)(1) to (3)] should be viewed as a narrow exception to its general practice of looking to State law to determine corporate status. The Commission will continue to treat all entities that qualify as corporations under State law as corporations for FECA purposes.

*Explanation and Justification to Final Rules on Treatment of Limited Liability*

*Companies Under the Federal Election Campaign Act, 64 FR 37397, 37398 (July 12, 1999) ("LLC E&J").*

Thus, because the Firm is not an LLC, the Commission looks to State law in the Firm's State of organization to determine whether the Firm is a corporation.

Accordingly, because the Firm is organized and operates as an LLP under the laws of Florida, and not as a corporation, it is treated as a partnership under the Act and Commission regulations.<sup>3</sup>

*(2) May the Firm administer and financially support the Committee as an SSF?*

No, because the Firm is a partnership, it may not pay the Committee's administrative expenses if these amounts exceed \$5,000 per calendar year.

Although the Act generally prohibits a corporation from making contributions or expenditures in connection with a Federal election, the Act exempts from the definition of "contribution or expenditure" a corporation's costs for establishing, administering, or soliciting contributions to, its SSF established for political purposes. *See* 2 U.S.C. 441b(a) and 441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii) and 114.2(b). However, the Act generally does not extend to a partnership the ability granted to a corporation to set up an

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<sup>3</sup> This conclusion is consistent with the Firm's operation as a partnership in other States. It is also consistent with previous advisory opinions involving limited liability partnerships where the Commission treated these entities as partnerships for purposes of the Act and Commission regulations. *See* Advisory Opinions 2006-13 (Spivack) and 2005-20 (Pillsbury Winthrop Shaw Pittman).

1 SSF and avail itself of the contribution and expenditure exemptions. *See, e.g.,* Advisory  
2 Opinions 2001-07 (NMC PAC), 1991-1 (Deloitte & Touche PAC) and 1990-20  
3 (Bradbury, Bliss); *see also* 2 U.S.C. 441b(b)(2)(C) and 11 CFR 114.1(a)(2)(iii). Because  
4 the Firm is not a corporation under the Act and Commission regulations, the Firm may  
5 not treat the Committee as its SSF and may not treat disbursements for the costs for  
6 administering the Committee, or for soliciting contributions to the Committee, as exempt  
7 from the Act's definition of "contribution or expenditure."

8 *(3) If the answer to Question 2 is no, may the Firm continue to contribute to the*  
9 *Committee as a nonconnected political committee?*

10 Yes, the Firm may make contributions to the Committee of up to \$5,000 per year.

11 A partnership is a person under the Act and Commission regulations. 2 U.S.C.  
12 431(11); 11 CFR 100.10. As such, a partnership is limited to contributing no more than  
13 \$5,000 per year to a nonconnected committee. *See* 2 U.S.C. 441a(a)(1)(C) and 11 CFR  
14 110.1(d).<sup>4</sup> Thus, the Firm may make contributions of up to \$5,000 per year to the  
15 Committee. In addition, these contributions are attributable both to the Firm and to its  
16 partners. 11 CFR 110.1(e)(1) and (2).

17 The Commission expresses no opinion regarding any tax ramifications of the  
18 proposed activities because those questions are not within the Commission's jurisdiction.

19 This response constitutes an advisory opinion concerning the application of the  
20 Act and Commission regulations to the specific transaction or activity set forth in your  
21 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any

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<sup>4</sup> Further, contributions by the Firm to the Committee must be paid for with funds from permissible sources (*i.e.*, funds not prohibited by 2 U.S.C. 441b, 441c, 441e, 441f, and 441g).



1 of the facts or assumptions presented, and such facts or assumptions are material to a  
2 conclusion presented in this advisory opinion, then the requestor may not rely on that  
3 conclusion as support for its proposed activity. All cited advisory opinions are available  
4 on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

5  
6 Sincerely,  
7  
8

9  
10 Robert D. Lenhard  
11 Chairman

1 ADVISORY OPINION 2007-25

2  
3 Christopher DeLacy, Esq.  
4 Holland & Knight LLP  
5 2099 Pennsylvania Ave., N.W., Suite 100  
6 Washington, D.C. 20006-6081  
7

**DRAFT B**

8 Dear Mr. DeLacy:

9 We are responding to your advisory opinion request on behalf of Holland &  
10 Knight (the "Firm"), concerning the application of the Federal Election Campaign Act of  
11 1971, as amended (the "Act"), and Commission regulations to the Firm's status as a  
12 corporation or a partnership under the Act and Commission regulations. The Firm asks if  
13 it may administer and "financially support" the Holland & Knight Committee for  
14 Effective Government ("the Committee") as its separate segregated fund ("SSF").

15 The Commission concludes that the Firm is a corporation under the Act and  
16 Commission regulations; and not a partnership. Hence, the Firm may administer the  
17 Committee as its SSF, and it may pay certain Committee expenses described below.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on  
20 October 11, 2007, and your email received on October 19, 2007.

21 The Firm is a law firm that is a limited liability partnership ("LLP") organized  
22 under the laws of Florida. On October 1, 2007, the Firm elected to classify itself as an  
23 association taxable as a corporation for federal tax purposes pursuant to 26 CFR  
24 301.7701-3. The Firm will continue to be treated as an LLP under Florida law and the  
25 law of all other states in which it operates. The Firm will be taxed as a partnership in

Massachusetts and Florida, although it will be taxed as a corporation in other states in which it operates.

The Committee filed a statement of organization on December 12, 2006, and is a nonconnected multicandidate committee.

### ***Questions Presented***

*(1) Is the Firm a corporation or a partnership under the Act and Commission regulations?*

*(2) May the Firm administer and financially support the Committee as its SSF?*

### ***Legal Analysis and Conclusions***

*(1) Is the Firm a corporation or a partnership under the Act and Commission regulations?*

The Firm is a corporation and not a partnership under the Act and Commission regulations because the Firm has elected to be taxed as a corporation by the IRS.

As described in more detail below, whether the Firm is a corporation for purposes of the Act determines whether it may pay administrative expenses of the Committee without those amounts being a "contribution or expenditure" as defined in the Act and Commission regulations.<sup>1</sup>

Neither the Act, nor Commission regulations define "corporation" or "partnership." Instead, while Commission regulations generally rely on State law to distinguish a "partnership" from a "corporation," specific regulations govern limited liability companies ("LLCs"), a form of business entity that is similar to LLPs. Under

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<sup>1</sup> The definition of "contribution or expenditure" includes a "gift of money . . . or anything of value" in connection with a Federal election. 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a); *see also* 2 U.S.C. 431(8) and (9); 11 CFR 100.52 and 100.111.

1 these rules, LLCs that elect to be treated as corporations by the Internal Revenue Service  
 2 under 26 CFR 301.7701-3, are also treated as corporations for purposes of the Act. 11  
 3 CFR 110.1(g)(2) to (3). The Explanation and Justification for these rules explains that to  
 4 treat as corporations LLCs that elect to be taxed as corporations advances the legislative  
 5 purpose of the Act's prohibition against corporate contributions, *i.e.*, preventing  
 6 conversion of the "substantial aggregations of wealth amassed by the special advantages  
 7 which go with the corporate form of organization" into "political war chests." See  
 8 *Explanation and Justification to Final Rules on Treatment of Limited Liability*  
 9 *Companies Under the Federal Election Campaign Act*, 64 FR 37397, 37399 (July 12,  
 10 1999) ("LLC E&J"), citing *FEC v. National Right to Work Committee*, 459 U.S. 197, 207  
 11 (1982). The Commission reasoned:

12 When an LLC elects corporate status for IRS purposes, it is essentially  
 13 telling the IRS that its organizational structure and functions are more akin  
 14 to a corporation than a partnership. This allows the LLC to accumulate  
 15 capital at the corporate level, and to take advantage of favorable tax  
 16 treatment of corporate losses and dividends received. Rather than  
 17 attempting to determine whether an LLC more closely resembles a  
 18 corporation versus a partnership, or simply classifying an LLC as a  
 19 partnership without any reference to its actual structure or form, the  
 20 Commission believes it can most effectively carry out [the Act's] intent by  
 21 classifying LLCs according to their federal tax status, which most  
 22 accurately describes whether an LLC's structure and function are more  
 23 akin to a "corporation" or a "partnership."  
 24

25 LLC E&J at 37399.

26 Here, the Firm has elected to be taxed as a corporation by the IRS, thereby in  
 27 effect "telling the IRS that its organizational structure and functions are more akin to a  
 28 corporation than a partnership" and putting itself into a position "to accumulate capital at

1 the corporate level, and to take advantage of favorable tax treatment of corporate losses  
2 and dividends received.” *Id.* Moreover, the Firm is also taxed as a corporation in all  
3 States in which it operates, except Florida and Massachusetts. Finally, like corporations  
4 and LLCs, the Firm, as an LLP, provides limited liability to its owners. *See Austin v.*  
5 *Michigan Chamber of Commerce*, 494 U.S. 652, 658-659 (1990) (noting that the limited  
6 liability enjoyed by corporations is one of the “special advantages” granted by State law  
7 “that enhance[s] their ability to attract capital and to deploy their resources in ways that  
8 maximize the return on their shareholders’ investments”). Thus, the same rationale that  
9 has led the Commission to treat as corporations those LLCs that elect to be taxed as  
10 corporations also leads the Commission to conclude here that the Firm is a corporation  
11 for purposes of the Act, even though the Firm is an LLP and not an LLC.

12 (2) *May the Firm administer and financially support the Committee as an SSF?*

13 Yes, because the Firm is a corporation, it may pay for certain of the Committee’s  
14 expenses described below.

15 Although the Act generally prohibits a corporation from making contributions or  
16 expenditures in connection with a Federal election, the Act and Commission regulations  
17 exempt from the definition of “contribution or expenditure” a corporation’s costs for  
18 establishing, administering, or soliciting contributions to, its SSF established for political  
19 purposes. *See* 2 U.S.C. 441b(a) and 441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii) and 114.2(b).  
20 Therefore, the Firm may pay the costs for administering the Committee and for soliciting  
21 contributions to the Committee. These payments would be exempt from the Act’s  
22 definition of “contribution or expenditure.” *Id.*

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

**Robert D. Lenhard**  
**Chairman**